

had a right of priority to payment out of the current earnings of the road in the hands of the receiver, and that if such earnings had already been diverted from that purpose and employed in the payment of the interest on the mortgage bonds, pursuant to orders of the court below, then that such claims should be paid out of the proceeds of the sale of the road, before such proceeds should be applied to the payment of the mortgage debt. *Fosdick v. Schall*, 98 U. S. 225; *Hall v. Frost*, 98 U. S. 389; *Atlegus v. Petersburg R. Co.*, 3 Hughes, 313; *Owen v. Harman*, 4 H. L. 997; *Beverly v. Brook*, 4 Grat. 187; *Syracuse City Bank v. Tollnap*, 31 Barb. 208; *Douglas v. Cline*, 12 Bush, 608; *Duncan v. Chesapeake, etc., R. Co.*, 3 Cent. L. J. 579; *Clark v. Williamsport, etc. R. Co.*, Supreme Court of Pennsylvania, and *Poland v. La Motte Valley R. Co.*, Supreme Court of Vermont, not yet reported. See, also, upon this subject, 2 Cent. L. J. 636; 3 *Ib.* 304, 338, and 4 *Ib.* 458.

LITERARY PROPERTY.

At common law, the author of an unpublished manuscript had a property in his production, which continued in him until publication by his consent. But the question of what rights an author possessed in his literary productions, independent of any statutory provisions upon the subject, was for a long time a topic of excited discussion among literary men, and one of much interest to the legal profession, it being a subject of much litigation in the courts. The first determination which the subject received in the court of King's Bench, was in the famous case of *Millar v. Taylor*,¹ decided in 1769. It was held by the court that while at common law an author had the sole right of first printing and publishing for sale his writings, yet after such publication made by him, he possessed no property rights in his production, which could be infringed by a republication by a stranger, unless the author had taken out a copyright under some statute giving him such right.

In 1774, the question was brought into the

House of Lords in the case of *Donaldson v. Becket*.² That case involved the consideration of several interesting questions.

1. The first of these was, whether at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and whether he might bring an action against any person who printed, published or sold the same without his consent. These propositions were sustained, eight of the judges voting in the affirmative, and three in the negative.

2. If the author had such right originally, did the law take it away upon the printing and publishing of such book or literary composition, against the will of the author? This was answered in the negative by seven of the judges, and by four in the affirmative.

3. If such action would have lain at common law, was it taken away by statute of 8 Anne (statute of copyright), and is an author by said statute precluded from every remedy except on the foundation of said statute, and on the conditions prescribed therein? Six of the judges answered in the affirmative, and five in the negative.

4. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law. Seven of the judges answered affirmatively, and four negatively.

5. Whether this right of publication in perpetuity was taken away by the statute of copyright. Six answered in the affirmative, and five in the negative.

Notwithstanding the answer of the judges to the fourth of the above propositions, as to the author's perpetual and exclusive property right at common law, in the future publications of his work, after having once published the same, the subject has since been seriously questioned, both in England and in this country, the Supreme Court of the United States saying in *Wheaton v. Peters*,³ that it could not be considered as free from doubt, but evidently inclining to the opinion that he had no such right. But no doubt exists as to the fact that an author did possess, by the common law, a property-right in his unpublished manuscripts.⁴ And it may also be considered

² 4 Burr. 2408.

³ 8 Peters. 591, 657, (1834).

⁴ *Wheaton v. Peters*, 8 Pet. 591; *French v. Maguire*,

¹ 4 Burr. 2303.

as established beyond all controversy, that when the author has once published his writings, he loses his private rights therein, and they become common property, and subject to the free use of the public,—in other words, that copyright exists only by statute.⁵ The first English statute which secured to an author the rights of literary property after publication, was 8 Anne, c. 19, which gave him the sole right of publication for twenty-one years. The present English copyright act is, we believe, the one passed in 1842. In this country, the framers of the Federal Constitution provided that Congress should have power “to promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.” In pursuance of this power, Congress, in 1790, passed our first copyright act. In 1870 the present act was passed, and an author has exclusive right to the publication of his writings for twenty-eight years from the time of taking out his copyright, with a right of renewal for fourteen years at the expiration of the first period.

Inasmuch as an author's rights in his manuscript or writings are lost at common law by publication, it is interesting to note the opinion that a publication of a work for private purposes and for private circulation, is not such a publication as defeats the common-law right of property.⁶ So one who permits his pupils to take copies of his manuscripts for the purpose of instructing themselves and others, does not thereby abandon them to the public, and if an attempt is made to publish them, their publication will be restrained by injunction.⁷

In *Crowe v. Aiken*,⁸ Judge Drummond declares that the delivery of a lecture is not such a publication of it as deprives the lecturer of his property rights therein. It can not be true, he says, that the lecturer has no rights

⁵ 55 How. Pr. 471; *Bouicault v. Fox*, 3 Blackf. 88, 97; *Parton v. Prang*, 3 Clifford, 537; *Rees v. Peltzer*, 75 Ill. 475.

⁶ *Jeffreys v. Boosey*, 4 H. L. 838; *Reade v. Conquest*, 9 C. B. (N. S.) 768; *Wheaton v. Peters*, 8 Pet. 591; *Rees v. Peltzer*, 75 Ill. 475, 478; *Parton v. Prang*, 3 Clifford, 537.

⁷ See *White v. Geroch*, 2 B. & Ald. 298; *Prince Albert v. Strange*, 2 De G. & Sm. 686; *Copinger on Copyright*, 9.

⁸ *Bartlett v. Crittenden*, 4 McLean, 300.

⁹ 2 Bissell, 208.

of property in his unpublished and unprinted lecture; that the clergyman has no rights of property in his unpublished sermon, the work of weeks of thought and labor, simply because he has repeated it to an audience. In *Keene v. Kimball*,⁹ decided by the Supreme Court of Massachusetts, the court disclaimed any intention of intimating that there was any right to report phonographically or otherwise, a lecture which its author had delivered before a public audience, and which he desired to use again in like manner, and to publish it without his consent, or to make any use of a copy thus obtained. “The student who attends a medical lecture,” say the court, “may have a perfect right to remember as much as he can, and afterward to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, without involving the right to commit the lecture to writing, for the purpose of subsequent publication in print or by oral delivery. So, any one of the audience at a concert or opera, may play a tune which his ear has enabled him to catch, or sing a song which he may carry away in his memory, for his own entertainment or that of others, for compensation or gratuitously, while he would have no right to copy or publish the musical composition.” In *Palmer v. DeWitt*,¹⁰ it is said that the delivery of a lecture in the presence of a public audience is not such a dedication of it to the public use, that it can be printed and published without the lecturer's permission. “It does not give to the hearer any title to the manuscript, or a copy of it, or a right to the use of a copy of it. The manuscript and the right of the author therein are still within the protection of the law, the same as if they had never been communicated to the public in any form.” In England the right of property in lectures has been confirmed by statute, which provides that no person, allowed for a certain fee to be present at any lecture delivered at any place, shall be deemed to be licensed to publish such lecture on account of having been permitted to attend the lecture, but that the sole right of publication shall be in the author.¹¹

⁹ 16 Gray, 545, 551.

¹⁰ 47 N. Y. 542.

¹¹ 5 & 6 Will. iv, c. 65. And that the delivery of a lecture to an audience admitted on payment of a fee is not a “publication” of the lecture. See *Abernethy v. Hutchinson*, 3 L. J., Ch. 209.

So the public representation of a dramatic play is not such a publication of it, as authorizes anyone to print it without respect to the property rights of the owner. In *Macklin v. Richardson*,¹² as long ago as 1770, an injunction was issued restraining the publication in a magazine of a farce which had been acted, but never printed. The mere performance of a play in a public theater, with the consent of the author, for a compensation to him, is no evidence of his abandonment of the manuscript to the use of the public.¹³ The fact that the author has withheld it from publication, entitles him to an injunction on principles of literary property, against one who publishes it without his consent, although represented in public without having been copyrighted.¹⁴ In *Crowe v. Aiken*,¹⁵ the court say that at common law the representation of a play upon the stage is not a dedication of it to the public, except so far as those who witness its performance can recollect it; nor have the spectators the right to secure its reproduction by phonographic or other means independent of memory; and that no restrictive notice is necessary to spectators to secure the author's rights, nor will such notice give him a right which he does not have at common law.

But a distinction exists between the right to publish a play, and the right to represent it upon the stage. In reference to this, the New York Court of Appeals says: "The right publicly to represent a dramatic composition for profit, and the right to print and publish the same composition to the exclusion of others, are entirely distinct, and the one may exist without the other. The copyright acts which secured to authors the exclusive right, for a limited time, to print and publish their works, did not secure to them the exclusive right of the public representation of their dramatic compositions. Until the passage in England of statutes 3 and 4 William IV., ch. 15, an author could not prevent anyone from publicly performing on the stage any drama in which the author possessed the copyright. He could only prevent the publication of his work by multiplication of copies of it."¹⁶

¹² *Ambler*, 694.

¹³ *Boucicault v. Fox*, 3 *Blatchford*, 88.

¹⁴ *Boucicault v. Hart*, 13 *Blatchford*, 47.

¹⁵ 2 *Bissell*, 208.

¹⁶ *Palmer v. De Witt*, 47 *N. Y.* 532.

This same right was secured to the author in this country, by act of Congress passed in 1856. Hence we find in *French v. Maguire*,¹⁷ the court saying that the public performance of a dramatic composition will permit the observer or hearer to appropriate for himself so much as his memory may be capable of retaining. But it will not allow the hearer and observer to appropriate and use the entire composition, with its incidental stage accompaniments. That right still remains in the author and his assignee. In this case, the court granted an injunction against a non-resident defendant, temporarily within the State when process was served, restraining him from performing or exhibiting a drama in a foreign State, in violation of the complainant's rights. In *Daly v. Palmer*,¹⁸ it is held that the various parts which go to make up a "scene" in a theatrical representation, consisting of gestures, spoken words, etc., constitute a dramatic composition entitled to protection, and a person is chargeable with infringement if the appropriated scenes of events, when represented on the stage, although performed by new and different characters, using different language, are recognized by the spectator through the medium of the senses, as conveying substantially the same emotions in the same sequence or order as the original.

In *Keene v. Kimball*,¹⁹ the Supreme Court of Massachusetts declare that the representation of a dramatic work, which the proprietor has no copyright of, and has previously caused to be represented and exhibited for money, is no violation of any right of property, although made without license of the proprietor. This is in harmony with the conclusion of the New York Court of Appeals in *Palmer v. De Witt*, already cited. But Keene's case is worthy of attention for the ingenious argument which counsel advanced to show that a dramatic composition was not entitled, in Massachusetts, to the protection accorded to literary property. In reference to this the court said: "Notwithstanding the ingenious and interesting argument for the defendant, derived from the principles and ideas of the Puritan founders of the Commonwealth, we

¹⁷ 55 *How. Pr.* 471.

¹⁸ 6 *Blatchford*, 256.

¹⁹ 16 *Gray*, 545.

can entertain no doubt that a dramatic composition is equally under the protection of the law with any other literary work. Courts will not interfere to vindicate the claims of any party to the exclusive enjoyment or disposal of an immoral or licentious production; but the particular application once made of this rule of the common law in conformity with the peculiar opinions, sentiments or prejudices of one generation of men, will not control its application in a state of society where different views prevail. If our ancestors prohibited all scenic exhibitions, it was because they regarded them as immoral and pernicious. If we do not so regard them, the reason ceasing, the rule ceases with it."

In the case of *Boucicault v. Fox*,²⁰ it is said that a person who agrees to write a play to be acted at the theater of another person, and who agrees to act in the play himself, so long as it will run, receiving a share of the profits as a compensation, does not thereby confer upon any one the legal or equitable title to the play, and he is entitled to take out copyright for it after it has been so acted in such theater. But in England, by the statute of 5 & 6 Victoria, ch. 45, sec. 20, the representation upon the stage of a dramatic piece, is declared to be equivalent to publication, and defeats all claim of the author to copyright.

We now pass to a consideration of the right of property in letters. Cicero speaks of the publication of private letters as being a gross offense against common decency.²¹ Not only is it an offense against common decency, but it is an offense against the law, being a violation of the writer's rights therein. This subject was very fully considered by Mr. Justice Story in *Folsom v. Marsh*,²² and the following quotation from his decision is of such interest, and states the law so fully and satisfactorily, that its length may well be pardoned. "The author of any letter or letters," says Judge Story (and his representatives), "whether

²⁰ 3 Blatchford, 88.

²¹ Quis enim unquam, qui paulum modo bonorum consuetudinem nosset, literas, ad se ab amico missas, offensione aliqua interposita, in medium protulit, palamque recitavit? Quid est aliud, tollere e vita societatem, quam tollere amicorum colloquia absentium? Quam multa joca solent esse in epistolis, quæ, prolata si sint, inepta videantur! Quam multa seria, neque tamen ullo modo divulganda! Orat. Phillip. ii., c. 4.

²² 2 Story, 100, 110.

they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and no persons, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account, or for their own benefit. But, consistently with this right, the persons to whom they are addressed may have, nay, must by implication possess, the right to publish any letter or letters addressed to them, upon such occasions, as require or justify the publication or public use of them; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper to establish his right to maintain the suit or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach. If he attempt to publish such letter or letters on other occasions, not justifiable; a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, but it is a violation of the exclusive copyright of the writer. In short, the person to whom letters are addressed, has but a limited right or special property in such letters, as a trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character. The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright." There is no doubt that letters may be produced in court to vindicate the rights of the person who received them,²³ and the necessity of vindicating one's character is a complete justification of their publication.²⁴ But the government, it seems, has a right to publish or to withhold all letters addressed to the public offices.²⁵

²³ See *Gee v. Pritchard*, 2 Swanst. 403.

²⁴ *Woolsey v. Judd*, 4 Duer, 379.

²⁵ *Folsom v. Marsh*, 2 Story, 100.

Is a fair, *bona fide* abridgment of an original work to be regarded as a piracy of the copyright of the author? In *Newberry's Case*,²⁶ decided in 1774, an injunction was asked to restrain the publication of an abridgment; but Lord Chancellor Apsley was of the opinion that an abridgment was not any violation of the author's property rights. The act of abridgment was, in his judgment, an act of the understanding employed in carrying a larger work into a smaller compass, and rendering it less expensive and more convenient—an abridgment being in the nature of a new and meritorious work. Lord Hardwicke, in *Gyles v. Wilcox*,²⁷ stated the rule as follows; "Where books are colourably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere invasion of the statute, and can not be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment; for an abridgment may, with great propriety, be called a new book, because not only the paper and print, but the invention, learning and judgment of the author is shown in them, and in many cases they are extremely useful." That a *bona fide* abridgment does not violate the rights of the author of the original work, seems to be no longer disputed.²⁸ But to constitute an infringement, it is not necessary that the larger part of a work protected by copyright should be appropriated. If so much is taken that the value of the original work is diminished materially, or the labors of the author are appropriated to an injurious extent, such appropriation amounts to an invasion of the copyright.²⁹ And where A published a life of Washington, containing 866 pages, of which 353 pages were copied from 'Sparks' Life and Writings of Washington, sixty-four pages being official letters and documents, and 255 pages being private letters of Washington, originally published by Mr. Sparks under a contract with the owners of the original papers of Washington, the court held the work to be an invasion of the copyright of Mr. Sparks, as it

sensibly diminished the value of the original work.³⁰ It is useless, however, to refer to any particular cases as to quantity, as the question of infringement does not necessarily turn upon the quantity taken, but upon the value of that which is appropriated.³¹ The principle has been well stated by Copinger, an English writer as follows: "The general principle is that the proper object of the copyright is the peculiar expression of the author's ideas, meaning by this, the structure of the work, the sequence of his remarks, and, above all, his language. * * * * If this view be correct, it follows that any abridgment of the work in the original author's language, is an infringement of his right; and, indeed, any quotation will be *pro tanto* a violation, unless excused on the ground of its inconsiderable extent."³² A clear distinction exists between an abridgment and a compilation. An abridgment, it is said, necessarily adopts the same arrangement and conveys the same knowledge in a condensed form, but a compiler can neither adopt the arrangement, nor convey by his extracts the same knowledge contained in that from which the compilation is made.³³ Mr. Justice Shipman, in *Banks v. McDivitt*,³⁴ has examined very fully the rights of compilers of books which are not original in their character, the compilations being of facts from common and universal sources of information, such as are contained in directories, digests, guide books, maps and statistical tables. While the compiler of such a book does not have a monopoly of the subject of which the book treats, any other person being free to make a similar book, yet the subsequent investigator must investigate for himself, from the original sources open to all. He will not be allowed to use the labors of the previous compiler, saving his own time by copying the results of the previous compiler's study. "The compiler of a digest, a road book, a directory, or a map," says Judge Shipman, "can search and survey for himself in the fields which all laborers are permitted to occupy, but he can not

²⁶ Lofft, 775.

²⁷ 2 Atk. 141.

²⁸ *Dodsley v. Kinnersley*, Ambler 403; *Whittingham v. Wooler*, 2 Swanst. 428, 430; *Tonson v. Walker*, 3 Swanst. 672.

²⁹ *Greene v. Bishop*, 1 Clifford, 186, 200.

³⁰ *Folsom v. Marsh*, 2 Story, 100.

³¹ *Saunders v. Smith*, 3 Mylne & Craig, 711, 736; *Bromhall v. Halcombe*, ib. 737, 738.

³² Copinger on Copyright, 37.

³³ *Story's Executors v. Holcombe*, 4 McLean, 306.

³⁴ 13 Blatchford, 163.

adopt as his own, the products of another's toil."³⁵

Doubt existed for a long time whether one could have rights of property, copyright, in translations—whether the mere act of giving to a literary composition the new dress of another language, added to the case an element which ought to take it out of the rule by which reproductions in other forms are prohibited. It is now settled that a man has a right to copyright a translation.³⁶

If a foreigner translates an English work, and then the foreign work is re-translated into English, it is an infringement of the original copyright.³⁷ And in *Stowe v. Thomas*,³⁸ it is said that to translate a work is no infringement of the copyright, although the author has previously had it translated into the same language, and secured a copyright for that translation.

A reviewer may be guilty of an infringement of the copyright of the author of the book reviewed. "The extracts must not be made too freely. Sufficient may be taken to form a correct idea of the whole; but no one is allowed, under the pretense of quoting, to publish either the whole or the principal part of another man's composition; and, therefore, a review must not serve as a substitute for the book reviewed. If so much be extracted that the article communicates the same knowledge as the original work, it is an actionable violation of literary property."³⁹ A reporter has a copyright in his marginal notes, and in the arguments of counsel as prepared and arranged by him, though he has none in the opinions of the court.⁴⁰ Ab-

³⁵ See, also, *Jarrold v. Houlston*, 3 K. & J. 708; *Kelley v. Morris*, L. R. 1 Eq. 697; *Scott v. Stanford*, L. R. 3 Eq. 718; *Lewis v. Fullerton*, 2 Beaver, 6; *Holten v. Arthur*, 1 Hemming & Miller, 603; *Hogg v. Kirby*, 8 Vesey, 215; *Matthewson v. Stockdale*, 12 Vesey, 270; *Longman v. Winchester*, 16 Vesey, 269; *Gray v. Russell*, 1 Story, 11; *Folsom v. Marsh*, 2 Story, 100; *Emerson v. Davies*, 3 Story, 768.

³⁶ *Millar v. Taylor*, 4 Burr, 23, 48; *Barnet v. Chetwood*, 2 Mer. 441; *Prince Albert v. Strange*, 2 De G. & S. 693; *Wyatt v. Barnard*, 3 Ves. & B. 77; *Emerson v. Davies*, 3 Story 768, 780; *Shook v. Rankin*, 6 Bissell, 480.

³⁷ *Murray v. Bogue*, 17 Jur. 219; 1 Drew, 353.

³⁸ 2 Wallace, Jr., 547.

³⁹ *Story's Executors v. Holcombe*, 4 McLean, 306; *Folsom v. Marsh*, 2 Story, 106; *Rowarth v. Wilkes*, 1 Campbell, 94, 97; *Wilkins v. Aikin*, 17 Vesey, 422; *Cary v. Kearsley*, 5 Esp. N. P. 170.

⁴⁰ *Wheaton v. Peters*, 8 Pet. 591; *Gray v. Russell*, 1 Story, 11.

stracts of title are subjects of copyright⁴¹ A sheet of music is a subject of copyright,⁴² but a newspaper is not.⁴³ The author of a libelous or immoral work can not maintain an action against any person for publishing a pirated edition of such work.⁴⁴ And Congress could not pass a law conferring the privilege of copyright upon immoral or indecent works.⁴⁵

Whatever right in the nature of copyright exists in this country, is created by, and exists only to the extent and upon the conditions specified in the acts of Congress, but relief from infringements is to be sought in the State courts, unless the residence of the parties in different States confers jurisdiction upon the Federal Courts.⁴⁶ Publication and delivery to the librarian of Congress of two copies of the work sought to be copyrighted, is as much a condition to the creation of a valid copyright, as is the filing a copy of the title page; and a bill to restrain an infringement is said to be demurrable, unless it avers performance of both these conditions.⁴⁷

HENRY WADE ROGERS.

ADULTERATION OF FOOD AND DRUGS.

"What a contrast between now and, say, only a hundred years ago! At that later date, or still more conspicuously for ages before that, all England awoke to its work with an invocation to an Eternal Maker to bless them in their day's labor, and help them to do it well. Now, all England, shopkeepers, workmen, and all manner of competing laborers, awaken as with an unspoken but heartfelt prayer to Beelzebub:—Oh, help us, thou great lord of shoddy, adulteration and malfeasance, to do our work with the maximum of slimness, swiftness, profit and mendacity, for the devil's sake, and an amen." So wrote the pungent pen of the late Thomas Carlyle; while Mr. Ruskin, less indisputably, will have it that "it is merely through the quite bestial ignorance of the moral law in which the English bishops have

⁴¹ *Banker v. Caldwell*, 3 Minn. 94.

⁴² *Clementi v. Golding*, 2 Camp. 25; *Clayton v. Stone*, 2 Paine, 382.

⁴³ *Clayton v. Stone*, *supra*.

⁴⁴ *Stockdale v. Onwhyn*, 11 Eng. C. L. 191; *Hirne v. Dale*, 2 Camp. 27, note b.; *Fores v. Johnes*, 4 Esp. 97; *Gale v. Leckie*, 2 Starkie, 107; *Lawrence v. Smith*, 1 Jac. 471.

⁴⁵ *Daly v. Palmer*, 6 Blatchford, 256.

⁴⁶ *Boucault v. Hart*, 13 Blatchford, 47.

⁴⁷ *Parkinson v. Laselle*, 3 Sawyer, 330.